

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of:)	
)	
Opinion requested by:)	No. 81-003
Institute for Governmental)	Feb. 1, 1982
Advocates)	
)	

BY THE COMMISSION: We have been asked the following questions by the Institute of Governmental Advocates (IGA):

Under the provisions of Government Code Section
86203:

- (1) May a lobbyist recommend to his or her employer that the employer host and pay for a dinner or luncheon, benefiting a public official, where the pro rata benefit to be conferred upon public officials in attendance will exceed \$10?
- (2) May a lobbyist recommend to his or her employer that specifically identified public officials be invited to attend a luncheon or dinner hosted by the employer where the pro rata benefit to be conferred upon invitees will exceed \$10?
- (3) May a lobbyist provide his or her employer with the names and addresses of public officials for the purpose of enabling the employer to send them invitations to attend a luncheon or dinner where the pro rata benefit to the public officials in attendance will exceed \$10?
- (4) May a lobbyist communicate with restaurants for the sole purpose of obtaining information for his or her employer as to available dates,

and as to the costs which may be incurred for food and beverages, in connection with a luncheon or dinner hosted by the employer, where the pro rata benefit to be conferred upon public officials in attendance will exceed \$10?

- (5) May a lobbyist recommend to his or her employer that a luncheon or dinner be hosted at a particular restaurant on a particular date if the pro rata benefit conferred on public officials in attendance will exceed \$10?
- (6) May a lobbyist recommend that his or her employer contract with a specific restaurant to provide a specific menu if the pro rata cost of the food and beverage to be provided to the public officials in attendance will exceed \$10?
- (7) May a lobbyist recommend to his or her employer that a particular individual at a particular restaurant be contacted by an employer for the purpose of contracting with the restaurant to provide food and beverage at a luncheon or dinner where the pro rata benefit to public officials in attendance will exceed \$10?
- (8) May an employer designate, on a written invitation prepared and mailed by an employer, a certain lobbyist to receive, and may the lobbyist receive, responses from public official invitees indicating prospective attendance or nonattendance at a luncheon or dinner where a pro rata benefit per attendee of more than \$10 will be conferred?
- (9) Would the Commission's opinion under questions (1) through (8) differ if the lobbyist does not attend the luncheon or dinner?
- (10) What reporting obligations, if any, would the lobbyist incur by engaging in the above-described conduct?

CONCLUSION

A lobbyist engaged in the activities specified in Numbers (1) through (7) is not arranging for the making of a

gift by another person and is, therefore, not in violation of Government Code Section 86203. No reporting obligations are incurred in performing such acts. A lobbyist engaged in the activity outlined in Number (8), however, would be violating Government Code Section 86203.

ANALYSIS

Government Code Section 86203^{1/} prohibits a lobbyist from making gifts to one person aggregating more than ten dollars per month, acting as an agent or intermediary^{2/} in the making of any gift, or arranging for the making of any gift by any other person. It is the desire of IGA, a nonprofit corporation whose members are lobbyists, to obtain greater clarification on the last of these prohibitions. Towards this end, IGA has provided the Commission with a list of specific activities and asked us to determine whether a lobbyist, doing these acts, would be violating the Act by arranging for the making of a gift.

Guidance, in making this determination, is provided by Institute of Governmental Advocates v. Younger (1977) 70 Cal. App. 3d 878. In that case, an appellate court affirmed a lower court opinion defining "arrange" as that word was used in Section 86202.^{3/} Section 86202, in part, prohibited

^{1/} Hereinafter all statutory references are to the Government Code, unless otherwise stated.

Section 86203 provides:

It shall be unlawful for a lobbyist to make gifts to one person aggregating more than ten dollars (\$10) in a calendar month, or to act as an agent or intermediary in the making of any gift, or to arrange for the making of any gift by any other person.

^{2/} None of the questions posed by IGA describe a possible "intermediary" situation. Consequently, this opinion focuses exclusively on the prohibitions against acting as an agent or arranging for the making of a gift.

^{3/} Section 86202 which deals with the making of contributions as opposed to gifts states:

It shall be unlawful for a lobbyist to make a contribution, or to act as an agent or intermediary in the making of any contribution, or to arrange for the making of any contribution by himself or any other person.

a lobbyist from arranging for the making of a contribution by any person.^{4/} The lower court cited Webster's Dictionary (New International Edition), as defining "arrange" to mean "to adjust or settle; to prepare; to determine; as, to arrange the preliminaries of an undertaking." "Used in this sense," the court said, "the word implies that the lobbyist must have contact with both the giver and the recipient about the contribution." Citing Words and Phrases, the court indicated that "arrangement" implies an agreement, tacit or otherwise, enforceable or not, perhaps customary, on a subject. (Institute of Governmental Advocates v. Younger, Super. Ct., L.A. Co., No. C 110,052).

The lower court also suggested that the word "arrange" might refer to activity all on the gift giver's side, involving no contact with the recipient, "i.e., raising the money for the gift, making the decision, writing the check, causing it to be delivered, etc." (Id.) This type of situation is illustrated in the Commission Opinion requested by Thomas F. Olsen, 1 FPPC Opinions 107 (No. 75-067, Aug. 7, 1975). There, a lobbyist's employer hosted an annual dinner to which public officials were invited. The pro rata benefit to each exceeded \$10. The Commission stated that it was improper for the lobbyist to organize the dinner, or to put together the gift packs of agricultural products which were to be distributed to each attendee.

Lastly, the lower court in Institute of Governmental Advocates v. Younger, stated that, in order to commit an act of "arranging," a lobbyist must do more than make a privately communicated recommendation for action to his or her employer. Such recommendations are protected as free speech under both the federal and state constitutions. (Institute of Governmental Advocates v. Younger, supra, No. C 110,052; Institute of Governmental Advocates, supra, 70 Cal. App. 3d 878, 884.)

^{4/} Section 86202 was declared invalid in Fair Political Practices Commission v. Superior Court (1979) 25 Cal. 3d 33, 45. The court held that the statute's restrictions were not "closely drawn to avoid unnecessary abridgement of associational freedoms. (Citing Buckley v. Valeo (1976) 424 US 1, 25)." The court, however, upheld the limitations imposed by Section 86203 on gifts. They stated that a lobbyist's function is to exercise his or her employer's right to petition the government for a redress of grievances. The restrictions of Section 86203 were said to merely burden that right and to affect the form of the petition (at 46-48).

The limitations imposed by Section 86203, on a lobbyist giving gifts, or on his or her acting as an agent in, or arranging for, the giving of gifts by another are designed to prevent a lobbyist from currying favor with public officials through such activities. The drafters of the Act believed that the recipients of gifts from lobbyists might become more receptive to the arguments of such lobbyists and not consider them purely on their merits.

The Commission has developed specific criteria to determine whether a lobbyist is acting as an agent in, or arranging for, the making of a gift. In doing so we have relied heavily on the language provided by the court in Institute of Governmental Advocates v. Younger, *supra*, which, although articulated in the context of contributions, rather than gifts, nevertheless provided the Commission with important guidance. In addition, we have sought to preserve fully the purposes of Section 86203. In applying the criteria to specific activities done by a lobbyist, it is assumed in each case that the value of the gifts in question have an aggregate value of over \$10 a month. Finally, this opinion assumes that in each case the gift was actually made, or that there is some other clear indication that the employer actually intended to make the gift.

A lobbyist is acting as an agent in, or arranging for, the making of a gift by another when he or she:

1. Takes any action involving contact with a third party which facilitates the making of the gift.
2. Has any contact with the public official who is to be the recipient of the gift which facilitates the making of the gift.

Applying these rules to the various situations presented by IGA we conclude that, under Section 86203:

- (1) A lobbyist may recommend to his or her employer that the employer host and pay for a luncheon or dinner benefiting a public official. Recommendations for action, between a lobbyist and his or her employer, are protected as free speech.

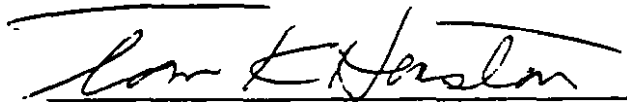
- (2) A lobbyist may recommend to his or her employer that specifically identified public officials be invited to attend a luncheon or dinner hosted by the employer. This also constitutes free speech.
- (3) A lobbyist may provide his or her employer with the names and addresses of public officials for the purpose of enabling the employer to send them invitations. In doing so, however, he or she may not contact the officials, or their agents and employees, to obtain the information.
- (4) A lobbyist may communicate with restaurants, for the purpose of obtaining information for his or her employer as to available dates and as to the costs which may be incurred for food or beverages in connection with a luncheon or dinner hosted by the employer. Such an activity is not prohibited by the first criterion articulated above because contact with third parties merely to gather information does not constitute a specific act which "facilitates the making of a gift." A lobbyist would however, be prohibited from actually making the reservations.
- (5) A lobbyist may recommend to his or her employer that a luncheon or dinner be hosted at a particular restaurant on a particular date. This is protected as free speech.
- (6) A lobbyist may recommend that his or her employer contract with a specific restaurant to provide a specific menu. It would be prohibited, however, for the lobbyist to contract on the employer's behalf, as this would be an act involving contact with a third party which facilitates the giving of a gift.
- (7) A lobbyist may recommend to his or her employer that a particular individual, at a particular restaurant, be contacted by the employer for the purposes of contracting with the restaurant to provide food and beverage at a luncheon or dinner. This is protected speech.

- (8) An employer is prohibited from designating, on a written invitation prepared and mailed by the employer, a certain lobbyist to receive responses from the invited public officials indicating their prospective attendance or nonattendance at a luncheon or dinner. Similarly, a lobbyist may not receive or transmit such replies. These activities are prohibited because they put the lobbyist in contact with both the giver and the recipient of the gift. If a lobbyist receives replies that he or she has not agreed to accept, a violation of Section 86203 may be avoided by returning the replies to the senders.
- (9) IGA asks whether the Commission's answers to Numbers (1) through (8) would differ if the lobbyist did not attend the luncheon or dinner. If the lobbyist's behavior does not violate Section 86203, such as where the lobbyist merely makes a recommendation to the employer, then, as a general rule, the lobbyist may attend without violating the Act. However, when the lobbyist attends a luncheon or dinner paid for by the lobbyist's employer, but which the employer does not attend, the lobbyist facilitates the making of the employer's gift by attending, thus violating Section 86203.
- (10) Lastly, lobbyists engaged in activities which do not constitute "arranging," such as those described in Numbers (1), (2), (3), (4), (5), (6) and (7), do not incur any reporting obligations under the Act. If, however, the lobbyist chooses to attend the event at his own expense, then he must report the expense as a General Lobbying Expense pursuant to Section 86107.

In conclusion, we want to emphasize that the Commission's answers apply only to the facts as given. A lobbyist confronted with a situation involving different facts who is unsure whether his actions constitute acting as an agent or "arranging" should request advice on the matter from the Fair Political Practices Commission pursuant to Government Code Section 83114 and 2 Cal. Adm. Code Section 18329.

Finally, a lobbyist may not direct another person, such as his or her employee, to do what the lobbyist would be prohibited from doing.

Approved by the Commission on February 1, 1982.
Concurring: Commissioners Conrad, Houston, Metzger and Ziffren.
Separate concurrence by Commissioner McAndrews.



Tom K. Houston
Chairman

COMMISSIONER MCANDREWS, CONCURRING:

I concur with the results reached by the majority on the questions posed by the Institute of Governmental Advocates ("IGA").

However, I would prefer to see the analysis based on prior court decisions and Commission opinions interpreting the terms "agent" and "arrange" as discussed in the majority opinion. I believe those decisions and opinions provide an adequate basis for justifying the answers to IGA's questions and make unnecessary the introduction of the new "specific criteria" on page 5 which encompass the concept of actions which "facilitate" the making of a gift. The concept of facilitation is new, unnecessary, and creates uncertainty. It is anything but specific.

The best example of uncertainty is seen when hypothetical Question #4 is examined. Webster's New International Dictionary (3rd Ed.) defines the term "facilitate" as: "to make easier or less difficult; free from difficulty or impediment." I believe obtaining information from a restaurant as to dates and costs falls under the concept of facilitation in the ordinary meaning of the term, and yet it is not proscribed under the majority's own analysis. The majority, without apparent rational basis, simply concludes that such information gathering is not facilitation.

I also agree with IGA in its Response to the Draft Opinion that "to proscribe actions which 'facilitate' the making of a gift would be to proscribe actions which fall far short of conduct necessary to violate Section 86203."

If the majority relied on the concepts of "acting as an agent" and "arranging," as interpreted in prior judicial and Commission opinions, and as employed commonly, the test could be stated as follows for any of the questions:

A lobbyist is in violation of Section 86203 when he or she:

1. Takes any action involving contact with a third party if the lobbyist is acting as an agent in the making of a gift, or is arranging for the making of a gift by any other person.
2. Has any contact with a public official who is to be the recipient of a gift if the lobbyist is acting as an agent in the making of the gift, or is arranging for the making of the gift by any other person.

Then question #4 can be answered simply, and uncertainty about the word facilitate is avoided:

(4) A lobbyist may communicate with restaurants for the purpose of obtaining information for his or her employer as to available dates and as to the costs which may be incurred for food or beverages in connection with a luncheon or dinner hosted by the employer. Such information gathering does not constitute acting as an agent or arranging for the making of the gift. A lobbyist would, however, be prohibited from actually making the reservations since this would involve acting as an agent and arranging for the making of a gift.

The prohibition has been a repeatedly troublesome section of the Political Reform Act. The Commission has consistently interpreted and enforced what was a clear mandate from the voters that lobbyists not make gifts in excess of \$10 to legislators and officials. Lobbyists have consistently asserted their free speech rights when attempts to define

"arranging" have overstepped constitutional speech protections, and they have tested and probed for elasticity in the prohibition. The questions posed by IGA demonstrate the difficulty and hairsplitting that occurs as lobbyists try to ascertain proper behavior in the face of the prohibition and the Commission, on the other side, attempts to uphold the law.

It behooves both sides to try to be clear, reasonable, consistent, and practical in resolving the questions. A good place for the FPPC to start is with clear, reasonable, consistent, and practical definitions of the word "arrange," and not new interpretations and concepts appearing in successive opinions each time the questions are rephrased.

Colleen C. McAndrews
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Commissioner